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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. PATRICIO ROSAS, Defendant and Appellant.	C059351 (Super. Ct. Nos. CRF06344, CRF064750, CRF074465)

In case No. CRF06344 (the February case), defendant Patricio Rosas pled no contest in February 2006 to possessing a controlled substance (methamphetamine). The court suspended imposition of sentence and placed him on probation, with a condition that he successfully complete a program for the treatment of drug addiction. The court also ordered that he pay a restitution fine, a drug program fee, and a laboratory fee.

In case No. CRF064750 (the September case), the defendant pled no contest in September 2006 to transporting methamphetamine (and a related recidivist allegation), and admitted a violation of probation in the February case. The

court reinstated him on probation in the February case; it also suspended imposition of sentence and placed him on probation in the September case, again on the condition that he complete a drug program, and ordered the payment of a restitution fine, a drug program fee, and a laboratory fee.

In case No. CRF074465 (the 2007 case), the defendant pled no contest in June 2008 to the 2007 case charging that he transported methamphetamine and had a prior similar conviction. He also admitted he had violated probation in the February and September cases. The court rejected a grant of probation in the 2007 case and sentenced him to state prison. It also revoked probation in the February and September cases and imposed consecutive prison terms. The abstract of judgment notes a restitution fine of $200 "FOR EACH CASE" (reflecting the court's statement at sentencing that "In each of these cases there's a $200 fine under [Penal Code] Section 1202.4"); although there was not any express reference to them at sentencing, the abstract of judgment also recited that a drug program fee "FOR EACH COUNT" and a laboratory fee "for COUNTS:A-1, B-1, C-1" were due.

At sentencing, the court directed the probation officer to determine the defendant's presentencing custody credits. In her supplementary report (filed after the defendant filed his notice of appeal), the probation officer calculated a total of 347 days of custody with 172 days of conduct and work credits in the three cases. According to correspondence that the defendant has

filed with this court, he requested the trial court to file an amended abstract reflecting these credits, but the trial court declined on the ground that it lost jurisdiction to do so upon the filing of the appeal.

On appeal, the defendant asserts (with the benefit of a certificate of probable cause) that the trial court erred in failing to reinstate him on probation in all three cases. He also argues that we should direct the trial court to prepare an amended abstract of judgment to reflect his custody credits, and must strike fines and fees in the 2007 case that duplicate those in the 2006 orders that granted probation. The People concede the latter two issues. We will otherwise affirm.

The facts underlying the several offenses are immaterial to the appeal, so we will not relate them in any detail. (We will include the facts relevant to his contested issue on appeal in the Discussion.) Found asleep in a truck in January 2006, the defendant consented to a parole search, and officers discovered methamphetamine on his person. In August 2006, the police were searching for the defendant. After seeing him get out of his car and enter a home (where he disappeared), they conducted a parole search of his car, and found two baggies of methamphetamine and a scale. Detained in August 2007 for committing traffic infractions, the defendant yet again consented to a parole search. There was methamphetamine in an off-white plastic baggie in a cigarette carton next to him, and a number of plastic shopping bags with cut out corners. In the

officer's experience, these small cut outs become packaging for drugs.

DISCUSSION

I

Denial Of Probation

In February 2008, the court set a hearing to determine if the defendant was eligible for probation under Penal Code[1] section 1210.1 in the 2007 case and sought an assessment from the felony probation drug court. The assessment (which reviewed the September 2007 probation report) noted his sincere desire to "get his life straight for his children," but declined to accept him for the program because he had shown minimal compliance with the requirements of parole and probation in previous treatment programs (including the falsification of attendance slips). The probation report (which the trial court reviewed at some unspecified time) noted his minimal satisfaction of his court imposed financial obligations and his parole agent's frustration with him (who described the defendant as "manipulative"). It did note his 21 negative drug tests during his recent participation in the drug program (although his counselor noted the display of "relapse behaviors" on his discharge from the program after his August 2007 arrest). The report also noted that in a jail interview "[h]e told the officer he had used some

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

a day or two prior [to the 2007 arrest], 'so they would not pin me with sales again.'"[2] The report concluded that the defendant's six arrests for methamphetamine offenses and his commission of the 2007 offense despite a lengthy treatment program and supervision from both parole and probation agents indicated his lack of amenability to treatment.

At the hearing, the defendant identified himself as the primary breadwinner for his wife and three children, working as a stuccoer. He wanted the opportunity to continue to support them. He had been abusing stimulants since he was 16, but had not attempted any treatment of his addiction until his court-ordered program in 2006 at the age of 34. The first time, he abandoned the program after his second 2006 arrest. On his second try, he had difficulty complying with the program because he was too tired from work to attend meetings (which led him to falsify attendance signatures) and because there were family problems between his sons (which led to his relapse when he was on the verge of completing it). What the program termed "relapse behaviors" was simply an attribution to him of drug use when he was in fact simply tired after working. Since his last experience with addiction treatment, he has found guidance from the Bible and has been attending "12-step" programs.

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[2] The arresting officer's August 2007 report (and preliminary hearing testimony) stated that the defendant admitted using methamphetamine a day or two earlier, and claimed that the drugs found in the car belonged to an unidentified person who had left them there after the defendant refused them.

The defendant conceded that he had served time in prison for three earlier methamphetamine offenses after he violated probation. He denied culpability in the September case, pleading no contest only so that he could get released from jail. He also denied that the methamphetamine in the 2007 case belonged to him.

The probation officer who had supervised the defendant in his addiction program since March 2007 said that after the second grant of probation in 2006, the defendant "was actually doing quite well. I believe he was following all of the terms of his probation up until the point . . . [in] mid-July, when [the problem with his children arose]. After that, he failed to appear for our next appointment. He was subsequently arrested and discharged from his program." The defendant never tested positive for methamphetamine, although he did miss a test before his arrest. He did not know whether the defendant would get greater benefit from a residential treatment program (which would be the next step after his failure on an outpatient basis). When asked if the defendant should be granted probation under section 1210.1, he stated his belief that the defendant's third arrest rendered him ineligible. He otherwise did not have any reason to believe further treatment would be inappropriate. He could not say one way or the other whether the defendant's participation in addiction treatment would endanger the recovery of others.

The court concluded that the only statutory basis on which it could exclude the defendant from probation in the 2007 case was section 1210.1, subdivision (b)(5) ("Any defendant who has two separate convictions for nonviolent drug possession offenses, has participated in two separate courses of drug treatment. . . , and is found . . . to be unamenable to any and all forms of available drug treatment [listed in § 1210, subd.(b)])," wondering aloud whether this applied to someone like the defendant who had *three* convictions. The court stated that it would normally conclude that the defendant was not amenable to ordinary probation. However, the court was "unable to say that [the defendant] is unamenable under [section 1210.1]. [¶] However, the People raise a good point about the exact circumstances of this case and whether it is actually just for personal use or was for other purposes.[3] [¶] And the Court is unable to say he should be placed on [section 1210.1 probation] again as well because the Court doesn't know the answer to that question. And this case is going to have to go to some sort of an evidentiary hearing on that." The court then set the matter for trial. At the next appearance, the defendant accepted the plea offer without any additional factual input or discussion of his eligibility for probation, and the trial court

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3 The prosecutor had made reference to the statement in the probation report regarding the defendant's jail interview in which he allegedly claimed to be trying to evade a charge of selling drugs.

imposed sentence immediately after receiving his plea without any discussion of probation.

The defendant argues that he was denied due process and equal protection of the law because the court did not apply the proper standards in refusing to reinstate him on probation under section 1210.1. The merits of this claim are not cognizable on appeal.[4]

The first problem is that the defendant never obtained a final ruling on his eligibility for reinstatement on probation under section 1210.1. For all its musing, the court never expressly made a ruling on the issue, and believed further evidence was necessary before it could do so. As a result, he cannot raise the issue on appeal. (Cf. *People v. Morris* (1991) 53 Cal.3d 152, 190 [pretrial ruling may be raised on appeal only where facts at that time are sufficiently concrete to determine issue].) The defendant asserts that the parties and the court treated its ruling as conclusive, but we do not interpret the record in that manner. Rather, the defendant abruptly entered a plea before the proceedings went any further.

However, even if we treat the court's musings as a final ruling that the defendant was ineligible, he is barred from raising the issue on appeal because he has received the benefits of his bargain to a stipulated sentence without reserving this

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[4] Neither party recognized this problem, for which reason we requested supplementary briefing.

issue for further litigation,[5] and is therefore trifling with the courts in his effort to obtain a more favorable sentence than that to which the People agreed. (Cf. *People v. Chatmon* (2005) 129 Cal.App.4th 771 [defendant's acceptance of negotiated sentence in exchange for plea estops him from seeking to challenge trial court's failure to place him on section 1210.1 probation instead of ordinary probation].) The defendant's efforts to distinguish *Chatmon* are unavailing. We therefore decline to address the merits of this argument.

II

The Abstract Of Judgment

As noted, the abstract of judgment does not include any calculation of the defendant's custody credits. The defendant is correct that the trial court erred in failing to prepare an amended abstract at his request. We must direct the trial court to prepare an amended abstract that reflects the probation officer's supplementary determination.

III

Fines

A restitution fine (required upon the conviction of any offense) that a court imposes in connection with the grant of probation continues in full force even after the revocation of probation, and therefore a court lacks statutory authority to

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[5] In exchange for his plea and admissions of violations of probation, the court dismissed a charge of possession of methamphetamine and several other recidivist allegations.

impose another fine when it renders judgment after revocation. (*People v. Chambers* (1998) 65 Cal.App.4th 819, 822-823 [striking second restitution fine], reaffirmed in *People v. Arata* (2004) 118 Cal.App.4th 195, 202-203 [rejecting People's attempt to overturn *Chambers*].)

The People concede that the defendant correctly points out the need to strike any *duplicative* restitution fine that the abstract of judgment imposes in connection with the February and September cases. They also agree that *Chambers* should apply by analogy to the fees imposed as conditions of probation in those cases, because those are also mandatory upon any conviction without any exception for a grant of probation and therefore must continue in existence even after the revocation of probation.

Unlike the situation where the fine or fee in the abstract of judgment is a different amount than that imposed at the time of a grant of probation, it is not clear whether the court was indeed imposing *additional* fines and fees, or simply meant to indicate the existence of the earlier imposed fines and fees. If the latter, we do not have any occasion to strike them. However, to avoid any adverse consequence from this ambiguity, in amending the abstract, the trial court shall also expressly note that, except for the 2007 case, the fines and fees are as previously imposed.

DISPOSTION

The judgment is affirmed. The trial court shall prepare an amended abstract of judgment reflecting the fines and fees in the February and September cases "as previous[ly] imposed" and including the custody credits calculated in the supplementary probation report, and file it with the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

SCOTLAND, P. J.

BLEASE, J.